No. 06-70884

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL ANGELO MORALES, Petitioner-Appellant v. STEVEN ORNOSKI, Acting Warden of California State Prison at San Quentin, Respondent-Appellee	**DEATH PENALTY CASE** **EXECUTION IMMINENT: February 21, 2006, at 12:01 a.m.**

REPLY TO OPPOSITION TO APPLICATION TO FILE SUCCESSOR PETTION FOR WRIT OF HABEAS CORPUS AND REQUEST FOR STAY OF EXECUTION

DAVID SENIOR, Esq. (Bar No. 108579)
McBreen & Senior
1880 Century Park East, Suite 1450
Los Angeles, CA 90067
Telephone: (310) 552-5300
Facsimile: (310) 552-1205

Attorney for Petitioner-Appellant
MICHAEL ANGELO MORALES

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

No. 06-70884

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL ANGELO MORALES, Petitioner-Appellant	)
v.	)
STEVEN ORNOSKI, Acting Warden of California State Prison at San Quentin, Respondent-Appellee	)

I. INTRODUCTION

The most critical fact in the *first* sentence of the Attorney General's Opposition – "in accordance with their *plan to commit murder*" – rests wholly and exclusively on the perjured testimony of Bruce Samuelson. Opposition to Application to File Second or Successive Petition for Writ of Habeas Corpus and to Request for Stay of Execution ("Opposition") at 1 (emphasis added). No reliable statement attributed to Mr. Morales ever mentioned a pre-existing *plan* to commit murder. *See* Opposition at 2.

Other than Samuelson's perjury, *no evidence* of a pre-existing plan to kill was presented at trial, or otherwise exists.

From the outset of this case, both Mr. Morales and his cousin Rick Ortega, then just 21 and 19 years old respectively, admitted their guilt for the murder in admissions that will imprison them for the remainder of their lives. As the police and prosecution learned in the first days of the investigation, however, the homicide was a tragic, unanticipated result of Ortega's desire to frighten the victim and dissuade her from disclosing his sexual orientation. The two young men intended to choke the victim unconscious and leave her in a remote area. Exhibit 26, at 70; Exhibit 34, Excerpt of Preliminary Hearing at 404-05. Instead, under the chaos and disorientation at the crime scene, the effects of Mr. Morales's ingestion of alcohol and PCP led to cataclysmic violence and the victim's death.

Statements – and later testimony – from civilian, i.e., non-informant, witnesses implicated Mr. Morales in committing the homicide, but none of the witnesses or physical evidence contradicted Ortega's explanation that there had been no pre-existing intent to kill. Nor did the circumstantial evidence, e.g., practicing with a belt to "hurt a girl," provide proof of a pre-existing intent to kill. *See, e.g.*, SER 3. Such evidence was instead consistent with the fact that the murder, and requisite intent, occurred only at

the crime scene. Pursuant to California law, the jury would have been required to adopt any reasonable inferences from such circumstantial evidence that pointed to Mr. Morales's innocence, rather than his guilt, of the special circumstance allegation. *See* former CALJIC (California Jury Instructions – Criminal) No. 2.02.

Samuelson's perjured testimony that Mr. Morales confessed that "*the intent* was to go out and kill her *to begin with*" and "had prepared or had gone out *in preparation*" to do so, provided the prosecution with the alleged evidence it needed to elevate non-capital murder to capital murder. RT 2336, 2339 (emphasis added). The purported "confession" necessarily eliminated any alternative explanation of the circumstantial evidence and rendered all other testimony merely corroborative of Samuelson's story. Samuelson was such a "key" witness on the issue of the "specials" allegation that the prosecutor, Bernard Garber, begged Judge K. Peters Saiers to give Samuelson an undisclosed deal, telling Judge Saiers the prosecution "had to have" the testimony to prove capital murder. Exhibit 2, District Attorney's Position Sheet on Bruce Samuelson; Exhibit 3, Declaration of John C. Schick, Esq. at 2; Exhibit 4, Declaration of Judge K. Peters Saiers.

To the extent respondent's representation to this Court that Mr. Morales "*confessed* to these facts," is intended to include the alleged "plan

to commit murder," the State is still exploiting testimony that it never has denied is rank perjury.[1] Opposition at 1-2 (emphasis added). Similarly, respondent's quotation from the Court's opinion regarding overwhelming evidence that Mr. Morales committed the murder and "why . . . or how" he did it, is lifted from the Court's *Brecht* analysis in reviewing evidence that was contaminated by Samuelson's perjury. *See Morales v. Woodford*, 388 F. 3d 1159, 1172 (9th Cir. 2004).

Samuelson's perjury, and the State's cynical exploitation of it, constitutes a malignancy that has afflicted the just litigation of this case by all the courts that have considered it. All homicides are tragic events that justly invoke the outrage and sorrow of any good person. But such emotions cannot authorize the prosecution to reach beyond the legal elements of a crime to punish a defendant for more than the offense he has committed. Such official action that leads to infliction of the death penalty "comes

---

[1] Nor can respondent seriously pretend that Mr. Morales "confessed" to a plan to commit murder "yet again just three weeks ago in his petition for clemency." Opposition at 2. Beginning the day after the tragic events in question, Mr. Morales admitted his guilt and expressed profound contrition for the victim's death to witnesses. At his trial and for the past 25 years, Mr. Morales has continued to accept full blame and feel deep remorse for all of the pain, sorrow and loss he has caused. This Court's ability to perform the important task before it is ill-served by respondent's attempt to distort Mr. Morales's expressions of profound remorse for his behavior.

perilously close to simple murder." *Herrera v. Collins*, 506 U.S. 390, 446 (Blackmun, J. dissenting).

Neither should such a result be tolerated in this case. Although, throughout the Opposition respondent alternately wholly ignores or summarily dismisses newly presented declarations of Samuelson's defense attorney and the trial judge who approved Samuelson's secret plea agreement, along with the statement of Mr. Morales's trial judge, these all support significant new facts and claims demonstrating the prosecutor intentionally and prejudicially presented false testimony. Notwithstanding respondent's hubris in disputing the considered opinion of Judge McGrath, who presided over not one but two trials of the crimes in this case, it is clear that without Samuelson's perjury there would have been no proof to overcome Mr. Morales's innocence of capital murder.

II. MR. MORALES'S NEW FACTS AND EVIDENCE PROVIDE GROUNDS TO REOPEN THE APPEAL OF THE DISTRICT COURT'S DENIAL OF AN EVIDENTIARY HEARING.

In the event the Court concludes the petition does not present new claims of misconduct, the record reflects that the State perpetrated fraud on the Court warranting a recall of the mandate and reopening the appeal of the denial of petitioner's claims without benefit of an evidentiary hearing.

In light of the grave consequences of error in a capital trial, the power to recall a mandate is inherent in the Court's power, which may be exercised when necessary to address new circumstances before the Court which are "grave" and "unforeseen," *Calderon v. Thompson*, 523 U.S. 538, 549 (1998), and to "prevent an injustice," *Zipfel v. Halliburton*, 861 F.2d 565, 567-68 (9th Cir. 1988); *see also Nevius v. Sumner*, 105 F.3d 453, 460 (9th Cir. 1996). Where a party to an action intentionally perpetrates fraud upon the court, regardless of how long the court's decision has been final when the fraud is discovered, the court should "without hesitation" recall the mandate or otherwise invalidate the judgment that was premised on fraud. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 245-46 (1944), *overruled on other grounds by Standard Oil v. United States*, 429 U.S. 18 (1976). In such cases, the judiciary's ordinary "deference to the deep rooted policy in favor of the repose of judgments" is supplanted by the need to correct injustice by granting relief from a judgment that was based on fraud and therefore "manifestly unconscionable." *Id.* at 239, 245-46 (ruling that circuit court properly recalled mandate "upon proof that fraud was perpetrated on it by a successful litigant," where fraud was discovered several years after judgment was final); *see Demjanjuk v. Petrovsky*, 10 F.3d 338, 348 (6th Cir.1993) (stating that in the *Hazel-Atlas Glass* case "[t]he

Supreme Court has recognized a court's inherent power to grant relief, for 'after-discovered fraud,' from an earlier judgment 'regardless of the term of [its] entry.'"); *see also Calderon v. Thompson*, 523 U.S. 538, 557 (1998) (stating that circuit court may recall mandate where there was "fraud upon the court, calling into question the very legitimacy of the judgment").

This Court has noted that "fraud upon the court occurs when an 'officer of the court' perpetrates fraud affecting the ability of the court or jury to impartially judge a case." *Pumphrey v. Thompson Tool Co.*, 62 F.3d 1128, 1130 (9th Cir.1995); *see also Weese v. Schukman*, 98 F.3d 542, 553 (10th Cir.1996) (noting that "fraud on the court should embrace only that species of fraud which does or attempts to, subvert the integrity of the court itself, or is a fraud perpetrated by officers of the court") (citation omitted); *Kerwit Med. Prods., Inc. v. N. & H. Instruments, Inc.*, 616 F.2d 833, 837 (11th Cir.1980) (same); *In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions*, 538 F.2d 180, 195 (8th Cir.1976) (citations omitted; describing fraud "as a scheme to interfere with the judicial machinery performing the task of impartial adjudication, as by preventing the opposing party from fairly presenting his case or defense."). In *Demjanjuk v. Petrovsky*, 10 F.3d at 348, the Court set out the elements of fraud sufficient to merit recall of the mandate as conduct "1. on the part of an officer of the

court; 2. that is directed to the 'judicial machinery' itself; 3. that is intentionally false, willfully blind to the truth, or is in reckless disregard for the truth; 4. that is a positive averment or is concealment when one is under a duty to disclose; 5. that deceives the court." Under the foregoing authorities, the facts alleged by Mr. Morales more than establish that the prosecution's failures to disclose exculpatory evidence, to correct false testimony, and refrain from proffering perjured testimony which "cast[ ] a dark shadow over the prosecution's intentions,"[2] constituted fraud upon this Court.

The AEDPA's limitation on successive habeas petitions is not a bar to recalling a mandate in cases, such as this one, where fraud has been perpetrated on the court. *See Calderon v. Thompson*, 523 U.S. at 556-57 (applying AEDPA to recalls of the mandate because a "State's interests in finality are compelling when a federal court of appeals issues a mandate denying federal habeas relief," but exempting cases of "fraud upon the court, calling into question the very legitimacy of the judgment"). More recently, in *Gonzalez v. Crosby*, __ U.S. __, 125 S.Ct. 2641, 2648-49 (2005), while admonishing litigants that Rule 60(b) motions are not inconsistent with the

---

[2] *Workman v. Bell*, 227 F.3d 331, 335 (6th Cir. 2000).

provisions of the AEDPA as long as they do not seek re-consideration of merits dispositions, the High Court confirmed that Rule 60(b) proceedings are always available upon a showing of "extraordinary circumstances justifying the reopening of a final judgment, " 125 S.Ct. at 2651, including "[f]raud on the federal habeas court." 125 S.Ct. at 2648. *See also, Demjanjuk v. Petrovsky*, 10 F.3d at 348 (court reopened habeas corpus case pursuant to Federal Rule of Civil Procedure 60(b)(6) and the All Writs Act, 28 U.S.C. § 1651 where court previously denied relief from extradition order to determine whether that proceeding had been tainted by fraud on the court or prosecutorial misconduct that required our intervention). Mr. Morales respectfully submits that the same procedures are warranted here.

III. MR. MORALES'S APPLICATION TO FILE HIS SUCCESSOR PETITION SHOULD BE GRANTED

A. Claim One is that Mr. Morales Was Denied His Constitutional Right to the Trial Court's Independent Judgment of the Appropriateness of His Death Sentence Because of Fraud, Deceit, and Misrepresentation.

In both his Application and Petition, Mr. Morales has clearly and repeatedly articulated this claim in simple language: the state's presentation of perjured testimony arbitrarily and prejudicially deprived Mr. Morales of his constitutional and statutory rights to a rational, informed, fair and reliable ruling on his automatic motion for modification of the death sentence, and an individualized sentencing

pursuant to California Penal Code section 190.4(e). Application at 15-16; Petition at 19-26. This claim is rooted in Mr. Morales's Sixth, Eighth and Fourteenth Amendment rights to due process and a reliable death judgment.

The state tries to recast the claim as a *Brady*[3] claim that was "previously raised and rejected" and represents "nothing more than a combination of Claims 4 and 5 from Petitioner's prior habeas petition." Opposition at 12, 13. The state hyperbolically – and quite incorrectly – states that the congruence of the claims is "readily apparent." Opposition at 13. Nonetheless, the state, in reconfiguring and then addressing the claim, makes an important, if not dispositive, concession: Judge McGrath's statement provided to the parties on or about January 25, 2006, "reflects new evidence." Opposition at 14.

The state continues its relentless vacuous campaign, which it began soon after its receipt of the Judge's letter, to dismiss the attempt of a courageous and honest judge to avoid a "grievous and freakish injustice," as a failure of recollection. In a lengthy footnote, respondent complains that it was "never contacted by Judge McGrath before he wrote to the Governor." Respondent apparently has not attempted to contact the judge in the twenty-three days since receipt of the letter to discuss the letter's contents or the judge's recollection of Samuelson's importance to the case.[4] Respondent questions Judge

---

[3] *Brady v. Maryland,* 373 U.S. 83 (1963).

[4] Alternatively, if respondent did contact the judge, the discussion must have yielded no countervailing information or facts as respondent has

McGrath's veracity in his letter to the Governor, but ignores evidence in the trial record to support Samuelson's importance to the lying-in-wait special circumstance.

That evidence comes from the prosecutor's argument in court on the motion to dismiss the special circumstances pursuant to California Penal Code section 1118.1, during which the prosecutor focused on Bruce Samuelson's testimony and its importance in explaining and contextualizing Cardenas's testimony. RT 2459.[5] This in-court argument tracks the prosecutor's pre-trial candid assessment in an internal office document that Bruce Samuelson was a key witness on the special circumstances. Exhibit 2. Like the prosecutor, the trial judge recognized Samuelson's testimony to be "indispensable" to the lying-in-wait special circumstance finding. Judge McGrath also found it "instrumental" in convincing him that "death was the only appropriate punishment in this case." Exhibit 1 at 2. Had there been an evidentiary hearing in this case, and had the judge been subpoenaed, he would have been free to give this testimony. Without such proceedings, however, he was unable, as a matter of judicial ethics, to comment outside a court proceeding on his view of the quantity and quality of the prosecution's evidence in Mr.

---

presented nothing to back up its assertions that the judge's recent letter is inaccurate.

[5] The prosecutor similarly relied on Samuelson's testimony in his defense of the torture murder special circumstance. That special circumstance was found unconstitutional by this Court and is not in issue here.

Morales's case. Respondent offers no argument that petitioner could have and should have sought out the trial judge's assessment earlier.

Respondent falsely professes a lack of knowledge about the material reviewed by the judge. Opposition at 14-15, fn. 5. The judge's letter, however, references the taped interview conducted by respondent's counsel in August 1993 and provided to Mr. Morales's counsel in December 1993, as well as the state's brief in opposition to Mr. Morales's petition for writ of certiorari. Exhibit 1 at 2.

Judge McGrath's letter, containing his view of the importance of Bruce Samuelson to his post-trial rulings in light of the demeanor of the prosecution witnesses at trial, created the factual predicate for a legal claim that theretofore was not possible. As explained in the application and alleged in the petition, the duties of the trial judge are set forth in California Penal Code section 190.4(e) in as peremptory and commanding language as possible.[6] In discharging these duties the judge is "required to assess the *credibility* of the witnesses, determine the *probative force* of the testimony and weigh the evidence." *People v. Rodriguez,* 42 Cal.3d 730, 793 (1986)

---

[6] The relevant portion of section 190.4(e) states: "In every case in which the trier of fact has returned a verdict or finding imposing the death penalty, the defendant *shall be deemed* to have made an application for modification of such verdict or finding pursuant to subdivision 7 of section 1181. In ruling on the application, *the judge shall review* the evidence. . . .and *shall make a determination*. . . .The judge *shall state on the record* the reasons for his findings. The judge *shall set forth the reasons*. . .and direct that they be entered. . .The denial of the modification. . .*shall be reviewed* on the defendant's automatic appeal. . . ." (Emphasis supplied)

(Emphasis supplied).[7] Judge McGrath's conclusion based on his familiarity with the evidence at trial is an issue of historical fact. *Parker v. Dugger,* 498 U.S. 308, 320 (1991). Without the trial judge's view about the importance of Mr. Morales's confession to Samuelson and attempted solicitation of murder as recounted by Samuelson to the 190.4(e) assessment, Exhibit 1 at 1, 2, there was no basis for challenging the reliability of the section 190.4(e) determination.

Respondent begins its recitation of the remaining evidence of lying in wait absent Samuelson's testimony, with the misleading reference to Mr. Morales's "admissions to the jury that he had, in fact, committed lying-in-wait murder." Opposition at 15, *see also, id.* at 2 ("Petitioner confessed to these facts to his jury."); 18 (commenting on his own admissions to the jury). Mr. Morales did not testify at either phase of trial. Neither the statements attributed to him by Cardenas and Flores nor any other part of their testimony supplies sufficient evidence of lying in wait absent Samuelson's testimony. As in its Informal Response to Mr. Morales's Petition for Writ of Habeas

---

[7] The trial judge's personal assessment based on his independent review of the evidence, followed by review of that determination by the California Supreme Court is so important to the fairness and reliability of the sentence imposed that if the judge fails to make that independent assessment, the state high court remands the matter to the trial judge if that is possible rather than engaging in a harmless error analysis. *Id.*; *see also, People v. Sheldon,* 48 Cal.3d 935, 962-63 (1989). Here, where that independent assessment is warped and rendered unreliable by state-sponsored perjury, there is even less reason to allow the state to proffer its own retrospective revisionist history about the strength of the evidence without Samuelson's testimony.

Corpus and/or Writ of Error Coram Vobis, the state relies on post-crime comments or descriptions of the crime, and post-crime "consciousness of guilt" evidence that do no more than acknowledge commission of *a crime*, but not a *capital* crime. Opposition at 15-18. Respondent inadvertently acknowledges the indispensable nature of Bruce Samuelson's testimony by beginning its Opposition with a fact that came only from his testimony – that Michael Morales and Rick Ortega had a pre-existing plan to kill the victim. The state's trivializing of Samuelson's testimony is no more convincing than its characterization of Mr. Morales's new evidence as "minor." Opposition at 13. That "minor" evidence includes, among other items, all members of the criminal justice system -- except, of course, the prosecutor -- who had contact with Mr. Samuelson at the time of trial -- Samuelson's trial counsel, trial judge, probation officer, and victim. Exhibits 3, 4, 6, and 12 –.

Mr. Morales had a federal constitutional right to the trial court's independent assessment of the credibility of the witnesses and the probative force of the evidence against him. First, the mandatory automatic review provisions of section 190.4(e) have long been identified in California as an essential constitutional component of California's death penalty scheme in lieu of other safeguards specified by the United States Supreme Court. *People v. Frierson,* 25 Cal. 3d 142, 178-79 (1979). Second, Mr. Morales is entitled, as a matter of due process, to "adequate, effective and meaningful" access to established adjudicatory procedures. *Bounds v. Smith,* 430 U.S. 817, 821 (1977). Third, the legislature's wording of section 190.4(e) and

conceptualization of the statute's operation create a constitutionally protected liberty interest in the enforcement of its terms and protections. *Board of Pardons v. Allen*, 482 U.S. 369, 373 (1987); *McQuillion v. Duncan*, 306 F.3d 895, 901-03 (9th Cir. 2002). Fourth, the arbitrary deprivation of a purely state law right or entitlement at sentencing also violates the due process clause. *See Walker v. Deeds,* 50 F.3d 670, 672 (9th Cir. 1995); *Fetterly v. Paskett,* 997 F.2d 1295, 1300 (9th Cir. 1993); *Campbell v. Blodgett,* 997 F.3d 512, 522 (9th Cir. 1993).

The state interfered with these constitutional rights by multiple constitutional violations including, but not limited to, its failure to disclose material exculpatory evidence,[8] failure to correct false testimony,[9] and knowing use of perjured testimony,[10] all of which resulted in the trial judge's imposition of a sentence based on misinformation or evidence that has been revealed to be materially inaccurate. *Johnson v. Mississippi,* 486 U.S. 578, 585-86, 590 (1988); *United States v. Tucker,* 404 U.S. 443, 447 (1972); *Townsend v. Burke,* 334 U.S. 736, 741 (1948). The prosecutor also interfered with Mr. Morales's right to the Eighth Amendment guarantee of heightened reliability in the imposition of an individualized death sentence. *Turner v. Murray*, 476 U.S. 28 (1986); *Caldwell v. Mississippi* 472 U.S. 320 (1985). We know today that if the trial judge

---

8 *Brady v. Maryland,* 373 U.S. 83.

9 *Napue v. Illinois*, 360 U.S. 264 (1959).

10 *Pyle v. Kansas*, 317 U.S. 213 (1942).

knew in 1983 what the Attorney General learned in August 1993 and what we have learned since about Mr. Samuelson's testimony[11], he "would not have let the death sentence stand." Exhibit 1 at 3. Accordingly, Mr. Morales's Application should be granted.

B. Claim Two is Supported by Substantial Newly Available Factual Information, None of Which is Acknowledged or Addressed by Respondent

By erroneously asserting that "[p]etitioner relies on no new facts here," Opposition at 22-23, respondent seeks to avoid conclusive evidence that the prosecutor, Bernard Garber, not only had direct knowledge of the undisclosed reward Samuelson received for testifying, but that he "essentially act[ed] as Mr. Samuelson's attorney" in securing the deal. Exhibit 3 at 2. This, and other new evidence of the prosecutor's pervasive misconduct in engineering Samuelson's deal, concealing extensive, material impeachment evidence and presenting false evidence at trial supports a substantially different claim from Claims 4 and 5 in the Amended Petition.[12]

Although apparently referring to the information and factual

---

[11] The many false aspects of Mr. Samuelson's testimony are set forth in more detail at pages 21-25 and 27-34 of the Petition lodged with the Application.

[12] In the alternative, as set forth in part II, above, respondent's conduct in misleading the district court and this Court to believe there was no evidence "'to show the prosecutor knew Samuelson's testimony was false,'" constitutes fraud upon the Court warranting a recall of the mandate to permit reconsideration of the denial of an evidentiary hearing on the issue. *See* Opposition at 21 (quoting Order Granting Respondent's Motion for Partial Summary Judgment and Denying Petitioner's Motion for Partial Summary Judgment, SER 164.)

allegations contained in the Petition at 27-34, respondent fails to acknowledge, let alone address, the new evidence alleged therein regarding three key players in this case: Samuelson's lawyer, John C. Schick; Judge K. Peter Saiers; and the prosecutor, Bernard Garber. *See* Opposition at 23. The interaction among these three individuals – as recounted by Mr. Schick, whose credibility is confirmed by Judge Saiers – substantially changes the nature and gravamen of previous claims based on the failure to disclose material exculpatory evidence and presenting false evidence.

First, the previous allegations of failure to disclose material evidence and to correct false evidence were premised on a verified court record of proceedings conducted on December 14, 1982, reflecting the lenient sentence the prosecutor promised Samuelson in consideration for his testimony. In opposition to Mr. Morales's request for an evidentiary hearing, respondent represented to the district court that a "simple and dispositive defect" in the allegations was that they were "legally and factually false." Exhibit 35, Opposition to Motion for Evidentiary Hearing and Cross-Motion for Judgment on the Pleadings; Memorandum of Points and Authorities in Support Thereof ("Opp. to Ev. Motion") at 81-82. Specifically, the State misled the district court to believe that *as a matter of law* there could not have been a guaranteed deal promised to Samuelson before he testified:

> Under California law, a prosecutor is without the power to bind the trial judge to any negotiated disposition. The trial judge retains the discretion to reject any negotiated plea agreement made by the prosecution anytime [sic] the judge finds the proposed sentence is too lenient. Thus, the prosecutor *could not as a matter of law* have

guaranteed Samuelson a one year county jail sentence, given the possibility that the sentencing judge could reject it as too lenient.

Opp. to Ev. Motion at 82 (emphasis added).

On Mr. Morales's appeal to this Court following the district court's grant of summary judgment, the Attorney General argued that because Samuelson's "plea agreement was not guaranteed," the December 14, 1982 transcript showed only "that the district attorney would recommend a one year sentence *provided* it was acceptable to the trial judge, which is *exactly what was revealed at trial.*" Respondent concluded that the transcript "establish[ed] neither the falsity of Samuelson's testimony nor the prosecutor's knowledge thereof." Ex. 36, Appellee's Brief at 58.

Thus, according to respondent, the allegations in the Amended Petition asserting disparities between the contents of the December 14, 1982 transcript and Samuelson's trial testimony did not raise any claim at all, because they lacked both factual and legal predicates. By contrast, Claim Two is based, in part, on indisputable and substantial evidence that *after* December 14, 1982, the prosecutor personally secured a *binding* agreement from Superior Court Judge Saiers, in *advance* of Samuelson's testimony *guaranteeing* Samuelson the deal he wanted. By respondent's own definition, it is a substantially different claim from any previously raised, because, at a minimum, it demonstrates both the falsity of Samuelson's testimony and the prosecutor's knowledge thereof.

Significantly, these new facts are provided by John C. Schick, an attorney with over 30 years experience who personally witnessed the spectacle of prosecutor Garber "begging" Judge Saiers for the deal. In turn, although Judge Saiers does not have an independent recollection of the

Samuelson negotiations, he does vouch for Mr. Schick as an attorney who "was always straight forward and honest." Exhibit 4. Equally significant, at no time during the exhaustion of this claim in state court, or as part of respondent's opposition, has the State suggested that Bernard Garber would dispute Mr. Schick's version of events.

Second, these facts demonstrate that the State withheld substantially more information than the very significant fact that Samuelson had a guaranteed lenient sentence rather than merely Garber's promise to make a recommendation. Mr. Schick's undisputed declaration demonstrates that Samuelson received the services of Garber, who "was essentially acting as Mr. Samuelson's attorney" in shepherding him through the criminal justice system. Among the extraordinary services rendered to this serial felon was – by respondent's own acknowledgment – a departure from "the rule of law in California" so that Garber could guarantee Samuelson the plea agreement he wanted. Petitioner submits that there is a material difference between the jury being informed that the district attorney intended at some future date to "recommend" a lenient sentence for Samuelson and actively "begging" a judge for authorization to assure Samuelson he would be getting exactly what he wanted. There was also a significantly material difference between the complicated machinations the prosecutor engaged in on Samuelson's behalf behind the scenes and "what was revealed at trial." Appellee's Brief at 58.

The impeaching evidence the State withheld concerned a "key witness" and "the lies related to the reasons why [he] testified." *Bagley v. Lumpkin*, 798 F. 2d 1297, 1301 (9th Cir. 1986). As this Court observed in *Bagley*, the more devastating aspect of the undisclosed impeachment

evidence was not the benefits Samuelson was promised, but the fact that he lied about them: "Evidence of bias and prejudice is certainly material for impeachment, but lies under oath to conceal bias and prejudice raise the impeachment evidence to such a level that it is difficult to imagine anything of greater magnitude that would undermine confidence in the outcome of any trial." *Id.*

Third, respondent elsewhere *concedes* that Mr. Morales has presented additional evidence, including "allegations and declarations of the informant's former trial counsel, the judge who presided over the informant's plea agreement, the attendant probation officer, and others familiar with the informant's criminal history, and finally the opinion of the trial judge at petitioner's own trial." Opposition at 13. In particular, the information from the probation officer and details of Samuelson's criminal history were especially material, and the prosecution had an affirmative obligation to obtain and review such information, and to disclose anything bearing on Samuelson's credibility. *Carriger v. Stewart*, 132 F. 3d 463, 480 (9th Cir. 1997) (en banc). Such evidence "need not have been independently admissible to have been material. Evidence is material if it might have been used to impeach a government witness, because 'if disclosed and used effectively, it may make the difference between conviction and acquittal.'" *Id.* (quoting *United States v. Bagley*, 473 U.S. 667, 676 (1985).

At the time of Mr. Morales's trial, Samuelson was a twenty-two year old offender, who had a criminal history that included charges of rape, burglaries, and car theft dating back to *age 12*. Exhibit 6, Declaration of Vickie Hale Wetherell, at 1. Samuelson manifested a "consistent pattern of deception and antisocial tendencies" marked by his "brazen disregard for the

law or conditions of probation, and his attempts to avoid responsibility by making up obvious lies." Exhibit 6 at 2. During his first four months of felony probation, Samuelson had missed reporting for three months, burglarized the *same* Stockton business that was the subject of the felony burglary for which he was on probation, and absconded to Arizona, where he was arrested while driving a stolen car. Samuelson lied to the Arizona police, denying he had stolen the car – which had been taken from Stockton – and claiming a "friend" had given him the stolen checkbook and check protector that were recovered form the car. Samuelson, in turn, lied to Ms. Wetherell about his culpability for the new crimes, claiming that he had committed many acts of forging checks so he could assist a family in need. He, of course, refused to provide Ms. Wetherell any identifying details about the phantom recipients of his largesse. Exhibit 6 at 2-3.

Samuelson's total disregard for the law included making excuses for himself, justifying his crimes and ultimately angrily attacking and blaming others -- "psychologists, the legal system, [and] employees of San Joaquin County, the State of California." Exhibit 6 at 3.[13]

Thus, particularly in combination with evidence of the extent to which

---

[13] The majority of the facts about the details of Mr. Samuelson's lengthy juvenile record, and Mr. Samuelson's continued "attempts to avoid responsibility by making up obvious lies," as described by Probation Officer Vickie Wetherell in her declaration are contained in her May 1983 Probation Report. That report was available to the prosecutor, but not Mr. Morales's lawyer before sentencing in Mr. Morales's case. The information in that report about Mr. Samuelson's ten year history of criminal conduct was available to the prosecutor, but not defense counsel, well before trial from the probation department.

the prosecutor acted as Samuelson's personal attorney – and the fact that Samuelson lied about such assistance – the jury readily would have concluded that Samuelson was unworthy of belief.

Even in the absence of respondent's concession that the foregoing information is new, Mr. Morales has demonstrated that the claims are predicated on information that could not have been obtained earlier in the exercise of due diligence. As set forth in Mr. Schick's undisputed declaration, he was reminded of the negotiations between Garber and Judge Saiers by a press call on January 27, 2006. He mentioned the events to a colleague at a capital defense office, and was then contacted by a representative of Mr. Morales's lawyer. Exhibit 3 at 3. Respondent neither explains how such fortuitously discovered information could have been found earlier with the expenditure of limited litigation resources, nor does respondent dispute that Mr. Morales was not required to contact a wide-ranging investigation based on nothing more than an assumption of prosecutorial misconduct. *See Williams v. Taylor*, 529 U.S. 420, 443-44 (2000).

Similarly, respondent offers no analysis to dispute the fact that absent the constitutional error, the jury could not have found the lying-in-wait-special circumstance allegations to be true. Opposition at 23. Instead, respondent again relies on this Court's description of the evidence supporting the judgment as being "overwhelming," overlooking the fact that the evidence the Court was misled to use as the foundation for this description included Samuelson's perjury. Samuelson's perjury did not relate to peripheral or fringe matters. It went to the very heart of the capital case against Mr. Morales and included a confession, considered to be

"probably the most probative and damaging evidence that can be admitted against a criminal defendant." Exhibit 1 at 1. In light of the allegations set forth in Claim Two of the Petition and for reasons stated in the Application, Mr. Morales urges the Court to grant his Application so that he may finally have the evidentiary hearing denied him by the state's repeated misrepresentations.

C. Mr. Morales Is Factually Innocent of Capital Murder and He Has Repeatedly Maintained He Did Not in Fact Commit Murder By Means of Lying in Wait.

The authority of federal courts to afford relief to a prisoner who is actually innocent, despite the applicability of procedural bars, "is grounded in the 'equitable jurisdiction' of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons." *Herrera v. Collins*, 506 U.S. at 404. This same authority enables federal courts to correct a deficiency in a state criminal justice system that "'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Id.* at 407-408 (citations omitted). From these principles the High Court assumed "that in a capital case, a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim." *Id.* at 417. Mr. Morales submits that his is such a case.

Mr. Morales can demonstrate his innocence of capital murder because

the trial judge, Judge McGrath, already has declared that Bruce Samuelson's demonstrated perjury leaves the evidence insufficient to support the only special circumstance allegation that renders Mr. Morales death-eligible. Other evidence affirmatively demonstrates there is no corrective state remedy to give effect to Judge McGrath's conclusion because the State did not disclose Bruce Samuelson's perjury until 10 years after trial, and after Judge McGrath and the state supreme court had lost jurisdiction.

Even if the requirements of 28 U.S.C. §2244(b) are wholly applicable in this context, Mr. Morales has demonstrated his entitlement to relief. Respondent does not dispute that Samuelson's 1993 claim to have interrogated Mr. Morales in Spanish, viewed in light of Mr. Morales's inability to speak Spanish, demonstrates that the entirety of Samuelson's testimony regarding Mr. Morales's confession was perjured. Neither does respondent dispute that Judge McGrath is the only state actor empowered by law to conduct an independent review of the evidence – including re-weighing the credibility of witnesses – to determine the adequacy of the evidence to support a death verdict. *See People v. Rodriguez*, 42 Cal. 3d 730 (1986). Nor can respondent plausibly dispute that from Judge McGrath's vantage point of having heard and considered the testimony in *two* trials of the issues in this case, he has determined that Samuelson's testimony was

"indispensable" to proof of the lying in wait special circumstance. Exhibit 1 at 2.

Although respondent now seeks to minimize the importance of the witness on whose behalf prosecutor Garber begged for a deal, Samuelson's false testimony, in particular his claims of a pre-existing intent and what Mr. Morales said happened in the car, was essential for the lying-in-wait special circumstance. Indeed, respondent continues to rely on *only* Samuelson to argue that Mr. Morales and his cousin had a "plan to commit murder." Opposition at 1. In turn, Garber read Samuelson's trial transcript to Judge McGrath in response to defense counsel's motion under California Pen. Code sec. 1118.1, to avoid dismissal of the special circumstance at the conclusion of the prosecution's case-in-chief. RT 2459-60.

Garber's only other evidentiary reference was to the testimony of Raquel Cardenas, who stated that Mr. Morales was going to hurt a girl with a belt, he sat behind her in the car, and that she screamed. But even Garber acknowledged to Judge McGrath that Cardenas's testimony required the "perspective" of Samuelson's key testimony. *Id.* at 2459. Standing alone, Cardenas could not establish pre-existing intent, waiting, watching, or seeking an opportune time to act – all necessary elements of lying-in-wait. Only after Garber recited Samuelson testimony to give *perspective* to his

then secondary reference, did Judge McGrath allow the jury to consider the special circumstance. RT 2465. As we know now from Judge McGrath, without the cornerstone of Samuelson's testimony, the death sentence would not have been imposed by his honor.

Having conceded that Judge McGrath's assessment of the record and the inadequacy of proof to support the special circumstance allegation "reflects new evidence to support [this] claim," Opposition at 6, the Attorney General does not dispute Mr. Morales's contention that Judge McGrath was ethically prevented from disclosing his opinion until the commencement of formal clemency proceedings. *See* Application at 6; California Judicial Conduct Handbook § 8.26 (2 ed. 1999); Cal. Pen. Code § 4803. Thus, respondent offers no basis to dispute the fact that the critical information that could come only from Judge McGrath was not previously discoverable in the exercise of due diligence.

Similarly, despite Bernard Garber's direct knowledge that Samuelson perjured himself at trial, neither the trial prosecutor nor the Attorney General disclosed that fact in the nearly 23 years since trial. Nor does respondent dispute that until January 2006, the information obtained from attorney John C. Schick, and presented in his declaration, also was not available through the exercise of due diligence. Samuelson's perjury, with the prosecutor's

knowledge and consent, is further evidence that Samuelson was an intentionally corrupting influence at Mr. Morales's trial. Together with evidence that only recently has been available through Samuelson's now grown children, Samuelson's demonstrated perjury confirms that he "is a deceitful, manipulative liar." Exhibit 9, Declaration of Sabrina Samuelson, at 2.

Having established these good reasons why the foregoing evidence was not available before the Amended Petition was denied, petitioner may rely on the evidence as a whole to establish his innocence. *See Herrera v. Collins*, 506 U.S. at 418. Among the most powerful evidence of Mr. Morales's innocence are the consistent statements and admissions of guilt of *non*-capital murder that he and his cousin have given beginning within hours of the offense. Respondent cannot plausibly suggest that the two young men, unschooled in the law and lacking the advice of counsel, could have known to parse their admissions so as to admit to a crime carrying a penalty of life in prison, while avoiding mention of facts that would elevate the penalty to death. Similarly, the reliability of Mr. Morales's innocence of capital murder is demonstrated by the statements of lay witness, who for two years did not disclose any statements or actions by Mr. Morales that established lying in wait.

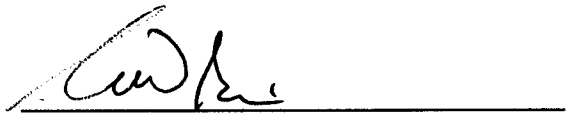
It was not until the prosecution obtained the distorting effect of Samuelson's "perspective" that the State was able to blur the truth and Mr. Morales's innocence beyond recognition. Mr. Morales can restore the focus of justice to this case, and prove his innocence. This Court should exercise its equitable and statutory powers to allow him to do so.

IV. CONCLUSION

For the reasons stated herein, and in the Application and accompanying Petition for a Writ of Habeas Corpus, petitioner requests a stay of his execution scheduled for February 21, 2006, at 12:01 a.m., and that he be allowed to file his petition in the District Court.

Dated: February 19, 2006.

Respectfully submitted,



David A. Senior
Counsel of Record for Petitioner